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DEPARTMENT OF LABOR & ECONOMIC GROWTH
LANSING

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Analysis of Enrolled House Bill 5317

Topic: Amending Articles of Incorporation
Sponsor: Representative Huizenga
Co-Sponsors: Representatives Vander Veen, Baxter, Wenke, Taub, Tobocman
Committee: House Commerce
Senate Economic Development, Small Business & Regulatory Reform
Date Introduced: October 18, 2005
Date Enrolled: March 2, 2006
Date of Analysis: Revised March 3, 2006

Position: The Department of Labor & Economic Growth supports the bill.

Problem/Background:

The Model Business Corporation Act ("MBCA") requires board approval of amendments to the articles of incorporation. The Delaware Code requires the board to send all proposals to the shareholders and the board may include an advisory opinion as to how the shareholders should vote. The Michigan Business Corporation Act currently allows the board to recommend what action the shareholders should take but requires shareholder approval for all amendments, except as provided in section 611(2).

Description of Bill:

The bill amends section 611(3) of the Business Corporation Act to add a requirement that all amendments must be proposed by the board before it can be considered by the shareholders.

Arguments For:

The bill conforms to section 10.03 of the MBCA. The MBCA and the bill both provide the proposed amendment must have board approval before it is sent to the shareholders for a vote. The bill aligns the Michigan act with the MBCA. This amendment will clarify that amendments to the articles of incorporation must be initiated by the board of directors. The Model Act has always required this procedure and the vast majority of states have adopted it.

Arguments Against:

The bill is a substantive change from current Michigan law. It is significantly different than Delaware law. The Delaware Code in Title 8, Section 242, states, "If the corporation has capital stock, its board of directors shall adopt a resolution setting forth the amendment proposed, declaring its advisability, and either calling a special meeting of the stockholders entitled to vote in respect thereof for the consideration of such amendment or directing that the amendment proposed be considered at the next annual meeting of the stockholders." The Delaware code requires the board to send every proposed change to the articles to the shareholders to be considered and allows the board to advise shareholders on which way they should vote on the amendment and why.

The bill would permit the board to filter out amendments to the articles that challenge their position or their power base. The bill increases the possibility of board entrenchment. For example, the board could block amendments which could result in their removal and prevent dilution of their power base by not allowing shareholders to increase the number of board seats. A Delaware case, *MM Companies Inc. v. Liquid Audio Inc.*, 813 A.2d 1118 (2003), said companies are not allowed to block such a proposal under Delaware law.

The bill would severely affect the rights of shareholders and institutional investors

Supporters:

Business Law Section of State Bar of Michigan

Opponents:

The only opposition to any of the bills in this package was to House Bill 5322. The Department of Labor & Economic Growth opposed House Bill 5322, because the problem that the bill was designed to solve had already been addressed in the expedited fee bills.

Other Pertinent Information:

As part of the proposed legislation to address the Simon Taubman situation Senate Bill 218 in the 2003-2004 legislative session included an amendment to section 611 to require board approval for amendments to the articles of publicly traded corporations. SB 218 was not adopted.

This bill is part of a package of bills (House Bills 5315-23) developed by the Business Law Section of the State Bar of Michigan as part of a regular review of Michigan's corporation laws. These reviews occur roughly at four-year intervals. The only opposition to any of the bills in this package was to House Bill 5322.

Administrative Rules Impact:

The bill will have no impact on administrative rules.

Fiscal Impact:

The bill will have no fiscal impact.